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IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes: California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3817)

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

RAY L. CHESEBRO,
City Attorney;
S. B. ROBINSON,
Chief Assistant City Attorney for Water and Power;
SAMUEL POORMAN, JR.,
Assistant City Attorney;
A. E. CHANDLER,
Special Counsel;
207 South Broadway, Los Angeles,
Counsel for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3817)

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The City of Los Angeles, a municipal corporation of the State of California, and Department of

Water and Power of The City of Los Angeles, a department created by the Charter of said City and (with its predecessors under said Charter), at all times herein mentioned furnishing to said City and its inhabitants, *in a proprietary capacity as a public utility*, a water service and a hydroelectric service, respectfully pray, both jointly and severally, that writs of certiorari issue out of this Honorable Court to review the decision and judgment of the Supreme Court of the State of California,[1] filed and entered on November 4, 1943, in those certain consolidated causes therein entitled "Natural Soda Products Company, Plaintiff and Respondent, vs. City of Los Angeles, *et al.*, Defendants and Appellants" (Superior Court No. 3783), and "Natural Soda Products Company, Plaintiff and Respondent, vs. City of Los Angeles, *et al.*, Defendants and Appellants" (Superior Court No. 3817), and on the register of said Supreme Court of California, numbered and designated "L. A. No. 18066," and wherein your petitioners' application for a rehearing (filed within the time allowed by law and the rules of said court last named), was by it denied on December 2, 1943.

Said decision and judgment *affirmed* the consolidated judgment of the Superior Court of the State of California in and for the County of Inyo, entered in said causes on April 29, 1941, adjudging that respondent recover from petitioners, "and each of them," damages in the sum of

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[1]Reported in 23 A. C. 190; 143 Pac. (2d) 12. [For copy of majority and dissenting opinions, see Appendix A, in separate volume filed herewith.]

$153,573.85, with interest thereon and three-fourths of the costs of suit (Superior Court No. 3817), but denying the injunction sought by respondent (Superior Court No. 3783).

The said judgment of said Superior Court in so far as the same awarded damages as aforesaid, had previously in an opinion filed December 14, 1942,[2] been *reversed* by the District Court of Appeal of the State of California, Fourth Appellate District.

Jurisdiction.

The effect of the decision and judgment whereof review is here sought is to deprive petitioners of their property without due process of law, contrary to the provisions of Article XIV, Section 1, of the Amendments to the Constitution of the United States. Petitioners made *timely claim* of title, right, privilege and immunity thereunder in their said petition for a rehearing by the Supreme Court of California, filed on November 18, 1943.[3]

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 [U. S. Code, Title 28, Section 344 (b)].

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[2]Reported in 56 A. C. A. 108; 132 Pac. (2d) 533. [For copy of opinion, see Appendix B, in separate volume filed herewith.]

[3]In the first of their briefs on appeal in the State courts, and in three subsequent ones filed therein prior to the rendition of said decision and judgment, petitioners made the same claim under the 14th Amendment, and also under Article I, Section 13, of the Constitution of California.

Summary Statement of Facts.

The City of Los Angeles, a municipality in California having a population in 1937 of more than 1,300,000 persons [Finding 6], now obtains and for many years has obtained, its principal supply of water[4] for domestic and other uses from Owens River, a stream draining the eastern slope of the highest portion of the Sierra Nevada Mountains and emptying into Owens Lake in Inyo County, California, the river's *natural* outlet. Owens Lake itself has *no* outlet and is therefore saline. The water for supplying the City is diverted from Owens River at a point thereon (Intake, formerly Aberdeen), some 25 miles upstream from Owens Lake, by means of a conduit known as the "Los Angeles Aqueduct," consisting of a series of canals, tunnels, pipes and siphons extending southerly from Intake, a distance of approximately 223 miles to reservoirs in and near The City of Los Angeles. The flow of water in the Aqueduct is by gravity.

The damages awarded respondent by said consolidated judgment were for losses claimed to have resulted from the *discharge* from Owens River into Owens Lake of so much of the *natural flow* of that river in the months from February to June, inclusive, 1937, as was in *excess* of petitioners' then *diversions* therefrom. Such diversions in that year and also in the months in question were *greater in volume* than in any prior corresponding period, but

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[4]During ten or more of the years preceding 1941, three-fourths of the City's water supply was derived from Owens River [Finding 4], and the remaining one-fourth from the Los Angeles River under the City's pueblo right. [For definition of such "pueblo right", see *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, at 117-122, and cases there cited.]

were *less* than the full *capacity* of the Los Angeles Aqueduct and its appurtenant surface reservoirs. There was also available to petitioners underground storage space in Owens Valley that could have been additionally availed of by increased spreading of surplus water on their lands, thus permitting of the percolation of some part thereof into the subsurface waterbearing strata.[5]

The existence of such surplus river flow in excess of petitioners' diversions was due to the *recurrence* in 1937 of the first wet year following an *unprecedented drought* of 18 years' duration (1919-1936), during which the surface of the salt cake that had formed in Owens Lake above the underlying brines became relatively dry,—*i. e.*, devoid of surface water. In 1937, the natural,—*i. e.*, unaugmented,—flow of Owens River increased *three-fold* as contrasted with the two years (1930-1931) immediately preceding respondent's acquisition of its properties. Although petitioners' diversions in that year and in the months in question were *higher* than in any *prior* corresponding period of the Aqueduct's history, their increase was less than the increase in the natural river flow by the 50,000 acre feet of surplus water that flowed into Owens Lake. The drought was of such severity that the then natural river flow was far short of petitioners' current needs for water and, during that period, such natural stream flow was augmented by pumping from the under-

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[5]In seasons of plentiful precipitation,—*i. e.*, when alone would it be necessary to dispose of surplus water by spreading,—the volume thereby withheld from Owens Lake is only about 35% of the total water spread,—the remaining 65% constituting the *return flow* that finds its way back into Owens River. [Deft. Exhibits Z 36 (1) and Z 36 (2).]

ground waters of Owens Valley; but there was *no* such augmentation of the natural river flow *in 1937*.

Prior to said 18 years' drought, there were, commencing with the Aqueduct's operation 1913, annual flows of water from Owens River into Owens Lake greatly in excess of such flow in 1937, the range being from a minimum lake discharge of 121,000 acre feet in 1913 to a maximum of 370,000 acre feet in 1914. Before the Aqueduct's operation, these lake discharges had ranged from a minimum of 206,000 acre feet in 1912 to a maximum of 413,000 acre feet in 1911. [Plff. Exhibit 1, p. 118.] The available water in 1937 was 368,000 acre feet (of which 293,000 acre feet constituted the flow of Owens River at Intake [Plff. Exhibit 1, p. 23] and 75,000 acre feet constituted the flow of lateral streams below Intake tributary either to Owens River or directly to Owens Lake. [Deft. Exhibit Z 11.] As contrasted with these figures, in the *five* driest years of the drought (1924-1925, 1929-1931), this water naturally available,—*i. e.*, surface flow unaugmented by pumping,—was, respectively, as follows: 139,000, 156,000, 159,000, 154,000 and 133,000 acre feet. [Plff. Exhibit 1, p. 22; Deft. Exhibit Z 11.] These figures include both the flow of Owens River and the flow of said lateral streams, and their annual *average* (148,000 acre feet) is only a trifle over *one-half* of the flow of Owens River *alone, and only 40%* of the *total* water available, in *1937*.

On the other hand, prior to the drought, there had been between 1906 and 1918, inclusive, *six* annual flows of Owens River *in excess* of that of 1937 (293,000 acre feet),—their range being from 339,000 acre feet in 1909 to 468,000 in 1906, and three other annual river flows

(1910, 1915, and 1917) of the approximate order of that of 1937. [Plff. Exhibit 1, pp. 21, 23.] These flows are to be contrasted (a) with petitioners' *highest* annual diversions *from Owens River* prior to respondent's acquisition of its properties (265,000 acre feet in 1922), and (b) with their highest *total* annual diversions into Haiwee Reservoir (265,000 in 1927), and (c) with their *still higher* diversions *in 1937* (271,000 acre feet *total*, of which 260,000 acre feet were *from Owens River*). [Plff. Exhibit 1, pp. 63-64.]

Notwithstanding petitioners' failure in 1937 to operate their said facilities to capacity, the actual extent of their use amply sufficed to supply the demands for water served by them from the Owens Valley source of supply. In *no* year prior to 1937 and in *no* portion of any prior year from February to June, inclusive, had the Aqueduct been operated to *as great* a capacity as in 1937 and in the same months of that year; but despite this circumstance, there has never been a shortage of water in Los Angeles.

The Aqueduct was completed in 1913[6] and has since been continuously operated, the volume of diversions therethrough exhibiting a long term *increase*. Extra capacity beyond current needs was provided therein looking to an anticipated increase in the demands served thereby, but such demands have *not* heretofore required the full use of such capacity.

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[6]The Aqueduct, for much the larger part of its course, traverses public lands, rights of way therein having been granted to The City of Los Angeles by Act of Congress approved June 30, 1906 (Public No. 395), "for conveying water to The City of Los Angeles". Apart from this legislative action, the work was, for its day, of monumental magnitude and of consequent general notoriety.

At Intake, immediately below the entrance into the Aqueduct canal, there is a diversion dam across Owens River, equipped with mechanically operated outlet gates and with overflow weirs whereby the whole or any lesser quantity of the flow of Owens River may be permitted to continue its natural flow down the natural river channel and thence into Owens Lake, the river's natural outlet. This diversion dam is between 200 and 300 feet in length, and along it stop, standing about 3 feet in height, are the mechanical appliances for operating the outlet gates and also the electric light standards for illuminating the structure. Within the Aqueduct canal, a short distance below its entrance from the river, are control gates whereby the water of the river may, at will, be excluded totally or in part from said canal or admitted thereinto in any amount within its capacity. By means of these gates and of the outlet gates and weirs in the diversion dam, petitioners can *regulate,* and they have *always* so regulated, the volume of their diversions into the Aqueduct in correspondence with the *demands* for water served by them. Obviously, during the drought, there was but little occasion to exclude water from the Acqueduct, the river flow being so far less than petitioners' needs for water, that they were then under the necessity of augmenting the natural stream flow by pumping from the underground water basin in Owens Valley.

On the Aqueduct, some 51 miles below Intake, is Haiwee Reservoir into which empties the upper aqueduct canal, and which was the only headwater storage reservoir of petitioners in existence in 1937. The Aqueduct canal between Intake and Haiwee Reservoir has always had a capacity of 800 second feet, but the Aqueduct below Haiwee Reservoir, which was originally of 400 second feet ca-

pacity, had such capacity increased to 480 second feet in 1931-1932. The length of this lower portion of the Aqueduct is approximately 171 miles and comprises covered canals, tunnels, pipes, and siphons. At its lower or southerly end are the necessary storage and regulating reservoirs, both for serving the City with water and for generating electric power for distribution within the City.

In 1929, petitioners created Tinnemaha Reservoir on Owens River, about 5 miles upstream from Intake, by throwing a dam across the river between the high lands beyond the channel on either side thereof. This is *not* a storage reservoir, its purpose and sole normal function being to *regulate* flows of the river in excess of 800 second feet by automatic temporary detention and subsequent release with the river's subsidence. At ordinary stages of the river, there is no water held therein, the defined natural river *channel* traversing the reservoir site and its flow discharging through a tunnel of a capacity of 800 second feet constructed in the river channel under the dam.

In addition to the control gates and the outlet gates at Intake, there are along the course of the Aqueduct gates for de-watering the same whenever such course becomes necessary, *e. g.,* in emergencies or for necessary maintenance and inspection. Water discharged from many of these gates would flow out upon lands in the Mojave Desert and/or across public highways, and one thereof discharges directly into Santa Clara River, a coastal stream crossed by the Aqueduct near its lower end and emptying into the Pacific Ocean. Petitioners have *no flowage rights* either in lands beyond the watershed of Owens Lake or in the Santa Clara River, and such discharges of water as

they are there compelled to make, are, in a few cases, by temporary limited permission, but for the most part give rise to claims for damages and threats of injunction, thus imposing upon petitioners the necessity of buying their peace. This is true even in respect of the Santa Clara River whenever such discharges thereinto occur during its high stages.

In 1932, respondent acquired a plant, on the bed of Owens Lake and on the shore thereof, for the extraction and processing of the lake brines. Such brines underlie a salt cake that has formed above them and, in 1932, the surface of this salt cake was virtually devoid of water. Without inquiry as to any of the factors entering into the presence or absence of water in the lake, respondent "*assumed*" that the lake surface would "continue" dry. In so "assuming," it *relied* entirely upon the then physical *appearance*, although it *knew* of the existence of the Los Angeles Aqueduct and of the fact that its purpose was to supply the City with water. This assumption was made notwithstanding the fact that *before* purchasing its properties, respondent was affirmatively advised by a written report made in 1930 by engineers employed for that purpose, that at the date of such report,—*i. e.*, after 10 years of unprecedented drought,—the inflow into Owens Lake from Owens River and other tributaries thereto was then merely *balanced* by evaporation losses and the industrial withdrawals of brine from the lake.[7] [Defts. Exhibit C, pp. 19-20.]

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[7]The report referred to was made to Mitchum, Tully & Company in April, 1930, and they were the parties actively promoting respondent's acquisition of its properties and were respondent's then principal stockholders.

The dry condition of the lake was the *resultant* of petitioners' diversions and the abnormally low stage of Owens River during said drought that commenced in 1919 and was only definitely broken in 1937. During these 18 years, petitioners' diversions, although *less* in volume than in 1937, took all, or virtually all, of the river flow, thereby practically discontinuing, for the duration of the drought, its discharge into Owens Lake;[8] but, with the return of wetter years, commencing in 1936, such discharge was resumed in considerable volume, and in the months of February to June, inclusive, 1937, was *actually* 44,397 acre feet, although the court found such discharge to have been "approximately 50,000 acre feet [Finding 11],—apparently for the reason that for the *full year* such discharge was 54,571 acre feet, while such discharge from Owens River *and* the lateral streams for the *full year* was 61,522 acre feet. [Plff. Exhibit 1, pp. 119 and 138.]

The successful operation of respondent's plant was dependent upon the absence of surface waters from the salt cake in Owens Lake, the principal interferences by such water being through dilution of the underlying brines and, more especially, through the cutting off therefrom of the solar heat whereby they are caused to attain a higher de-

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[8]There was no complete discontinuance of such discharge in any year, but in nine years of the drought, none of the river flow at Intake contributed thereto [Pltff. Exhibit 35], such discharge in those years being the make of the stream below Intake,—a circumstance demonstrative of the uninterrupted physical existence of the channel of Owens River and of its functional continuity as such.

gree of alkalinity than would be otherwise possible. The discharge from the river into Owens Lake in the spring and summer of 1937 raised its water level by approximately 2½ feet, and, in addition to doing damage to respondent's physical properties on the lake bed, so prevented the lake brines from attaining alkalinity as to greatly curtail respondent's output of soda ash obtainable therefrom. During such flow of water into Owens Lake, the Aqueduct gates at Intake were so operated as to exclude from the Aqueduct, and thus permit to flow down the river channel below, the *surplus* river flow *not required* by petitioners, such operation conforming to petitioners' practice throughout the history of the Aqueduct whenever the river flow was in excess of their needs. Even during 9 of the 18 years of drought, the outlet gates in the diversion dam were opened for periods aggregating just short of 99 days. [Plff. Exhibit 35.] The obvious reason for such curtailed operation of these gates was the low stage of the river and the consequent *nonexistence*, during most of the period of drought, of any *surplus* water whatever in excess of petitioners' current diversions, although such diversions were then annually much less in volume than in 1937.

Statutes Involved.

The pertinent provisions of the Constitution and laws of the United States and of the Constitution and laws of the State of California are the following:

Constitution of the United States, 14th Amendment, Section 1;

Judicial Code, Section 237 (b); U. S. Code, Title 28, Section 344 (b);

Constitution of California, Article I, Section 13;

Constitution of California, Article XIV, Section 3;

Civil Code of California, Sections 1410, 1411, 1415 and 1416;

Water Commission Act of California, Section 20; Cal. Stats. 1917, p. 746.

The pertinent provisions of said Constitutions and laws are set forth in Appendix C, appearing in the separate volume filed herewith.

Questions Presented.

These causes involve the following questions (the determination of which in the *affirmative* by the Supreme Court of California constitutes a *taking* of the property of petitioners *without due process of law*), to wit:

(1) Does an appropriator of water from a stream owe any *duty* to a downstream proprietor thereon, or in the lake constituting its natural outlet and place of discharge, *to divert*, in any amount whatsoever, water that, in its *natural course*, would reach such downstream proprietor?

(2) Is a municipal appropriator of water (petitioner City) from a stream (Owens River) emptying into a saline lake (Owens Lake), its sole natural outlet, *obligated*, at the appropriator's expense or peril, to divert from the stream, and *dispose of*, surplus water *in excess* of the appropriator's needs up to the capacity of its Aqueduct, its reservoirs, and its spreading grounds,—such appropriator having provided Aqueduct and reservoir capacity, beyond that hitherto required, to meet the future increase in the demands supplied by it,—in order to prevent the natural discharge of such surplus water into said lake and thereby to benefit a manufacturer of products from the lake brines by rendering such brines *more profitably available*,—the expense of such disposal being inclusive not only of added operational costs for spreading, storage, transportation and spilling of such surplus water, but also of new capital outlay for the acquisition of flowage

rights in lands and in a river, each in a watershed other than that of the stream of such water's origin?

(3) Is said manufacturer *entitled to rely* upon the appropriator's diversion and disposal of such surplus water in a year (1937) when the stream flow becomes greater than normal,—following an 18-year period of unprecedented drought (1919-1936) and the reduction of the stream flow consequent thereon,—because said saline lake became *dry* and relatively *dry*[9] due to the apropriator's then diversions to supply current demands, which diversions, though *less* in volume than in the period here in question (1937), left little or no *residual* water in the stream to flow down its channel in the course prescribed by nature and thence discharge into said saline lake, its natural outlet?

(4) Does the inhibition upon the "*waste* of water", contained in Article XIV, Section 3, of the constitution of the State of California, obligate said appropriator *to prevent* the *surplus* stream flow,—*i. e.*, the water not needed for the uses served by the appropriator,—from discharging through its natural channel into said saline lake, and thereupon to dispose of such surplus by wasting the same *artificially*, in order to render the mineral content of the brines in said lake more profitably available to such manufacturer?

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[9]That is to say,—"dry" except for the brines permeating and underlying the salt cake exposed by the recession of surface water.

(5) Can such an artificial conduit as the Los Angeles Aqueduct,—the sole purpose and function of which is to supply the demands for water within a municipality,—ever acquire the *status* of the *channel* of the stream from which it diverts *in substitution* for its extant natural channel, or have attached to it any of the rights inherent in a natural channel and stream; and does such an artificial conduit, by reason of its performing the single function of transporting water by gravity to serve *specific and limited demands,* in volumes fluctuating but gradually increasing, become impressed with the other functions served by a natural stream channel giving rise to *corresponding rights* in the public, and in proprietors on either such artificial conduit or on the natural channel?

In the brief appended, not only are the foregoing jurisdictional questions developed, but attention is invited to certain additional *non*-jurisdictional points decided by the Supreme Court of California in contravention of general law.

The Crucial Ruling of the Supreme Court of California.

Under a total misapprehension of the true state of facts, as exhibited by the *uncontradicted evidence* relied upon by respondent (the same being petitioners' Aqueduct records), the Supreme Court of California misapplied (as, indeed, it could have hardly avoided doing in view of such misapprehension), an undoubted rule of law,—namely, that "one who makes expenditures in reliance on long-continued diversion of water by another has a right to have the diversion *continued,* if his investment would otherwise be destroyed" [143 Pac. (2d) 15] and "should receive as much protection as if the condition were *natural*" [143 Pac. (2d) 16.] This rule said Court applies to a supposititious state of facts (in part inaccurate and utterly fragmentary,—*i. e.,* divested of the controlling factors) which, as stated in its opinion, is as follows:

(a) "From 1919 to 1937 [The City of Los Angeles] diverted into [the Aqueduct] virtually *all* of the flow of the Owens River."

(b) "As a result, the lake *dried up.*"

(c) Thereupon the lake's "subsurface became a crystalline cake impregnated with brines containing valuable chemicals."

(d) The "*extent* of the flow [into Owens Lake] was determined by the manner in which [petitioners'] operated [their] Aqueduct."

(e) "Below [Tinnemaha] dam, the water, which flowed through its natural channel until it reached Intake, "*could be directed* into the Aqueduct proper by means of [petitioners'] diversion dam, or into Owens Lake if the gates in the dam were opened."

(f) "On February 6, 1937, * * * [petitioners] opened the gates at Intake [and thereafter] continued to direct the water into the lake intermittently until July 1, 1937," flooding the lake with "approximately 50,000 acre feet of water." [143 Pac. (2d) 15.]

The Points of Divergence Between the Actual and Undisputed Facts and the Supposititions State of Facts Constituting the Basis of the Decision of the Supreme Court of California.

Succinctly, the recital of the *supposed* facts upon which the State Court proceeded in rendering the decision and judgment whereof review is sought, exhibits the following *erroneous* apprehensions of the true situation:

(1) The natural flow of Owens River is treated by the court as a *constant*. The State Court selects the period of *drought* (1919-1936), in disregard of all other years, as correctly exhibiting a permanent *total* depletion of the river flow by petitioners' diversions. In so *disregarding* the prior historic stream flow records and in considering only the effect of petitioners' diversions upon the *reduced flow* of the river during the drought, the court proceeds as though the river flow were practically constant in volume. Based on this misconception, the court concludes that, since petitioners so totally depleted that flow during the drought as to leave *no* residual water in the river channel below Intake and hence caused the drying up of the lake, petitioners must not only *continue* diversions, but make them on a *scale* sufficient to preserve that condition.

(2) The State Court thus loses sight of the fact that the discharge from Owens River into Owens Lake,—*i. e.*, the *residual* water left in the river channel,—is the *resultant* of two factors, (a) the natural stream flow at Intake, and (b) petitioners' diversions therefrom. The fact is that, far from being a constant, the natural flow

of Owens River exhibits the widest fluctuations, both seasonal and cyclic, the annual maximum having been attained in 1906 (468,000 acre feet), and the minimum during the 18 years' drought when the aggregate of such flow for the *two years* 1930-1931 (245,000 acre feet) was 223,000 acre feet *less* than in the one year 1906), and 44,000 less than the 290,000 acre feet of the *one year* (1937) here in question. [Plff. Exhibit 1, pp. 21-23, and Plff. Exhibit 53.]

(3) The State Court treats petitioners' diversions as the *sole cause* of the drying up of the lake, in total disregard of the low stage of the river during the drought as a contributing cause. In point of fact, petitioners' diversions in each year during the drought and from February to June, inclusive, in each such year, were *less* than in 1937. Hence, the incursion of water into Owens Lake in 1937 was not due to any *curtailment* of diversions by petitioners, but to the almost three-fold *increase* in the river flow[10] and the destruction thereby of the *balance* between river flow and diversions that had prevailed during the prolonged low stage of the river.

(4) The State Court fails to note that petitioners' diversions *in 1937* were the then *highest on record* and hence that the termination in that year of the prior *dry* condition of Owens Lake was due,—not to any deviation by petitioners from the standard of conduct established

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[10]As compared with the three lowest annual natural river flows during the drought (1924, 1930 and 1931).

by their diversions from 1919 to 1936,—but to an increase in the river flow from the lowest on record to more than the average flow during the prior history of the Aqueduct.

(5) The State Court fails to note that, with such an increase in 1937 in the *river flow*, it was an utter physical *impossibility* for the lake discharge to remain as low as during the drought, notwithstanding an increase of petitioners' diversions in that year, since such increase was *not* commensurate with the increase in the river flow.

(6) The State Court to the contrary notwithstanding, "the lake's subsurface" did not "become a crystalline cake, impregnated with brines containing valuable chemicals" upon the drying up of the lake. It was the brines that were "subsurface", *i. e.*, beneath the salt cake. Over them the "crystaline cake" had been formed through a period not definitely established, and such brines were rendered more profitably available by the recession of the lake water.

(7) As indicated in paragraphs numbered (1) to (5) last above, the State Court is in error in declaring that the "*extent* of the flow into Owens Lake] was determined by the manner in which [petitioners] operated [their] Aqueduct." On the contrary, the lake discharge was due to the imbalance in 1937, produced by natural causes, between the flow of Owens River and the volume of petitioners' *diversions* therefrom. The State Court thus fails to note that in 1937 petitioners made *no* contribution to this imbalance by ceasing or curtailing their diversions from

the river,—the fact being that those diversions were then *higher* than in any prior year or in the months from February to June, inclusive, of any prior year.

(8) In correctly declaring that Tinnemaha Dam was constructed across Owens Valley, the State Court apparently considers the dam as collecting and concentrating in Owens River water that *would not otherwise* reach it. The undisputed evidence is that said dam has *no* effect upon the volume of the flow in the river. All the natural drainage of Owens Valley reaching the dam site flowed across that site before the dam was built, and the dam's sole effect upon such flow is to deflect it along the dam's upper face and thus into the channel of Owens River somewhat earlier than it would otherwise reach the same. If the dam were not there, the whole of this drainage water would reach the river well above Intake. [Rep. Tr. p. 1195.][11]

(9) The State Court correctly treats Tinnemaha Reservoir's function as that of *regulating* the river flow; but it later declares that petitioners "could easily have found an outlet for the *surplus* water instead of causing it to flow into the lake," [143 Pac. (2d) 16] and that they "could have stored some of this water in Tinnemaha Reservoir for later release down the Santa Clara River or onto the

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[11]Anyone rightfully damming a stream to avail of its water to any extent may allow the surplus water to overflow or otherwise discharge into the channel of the stream below the dam [*Bruton v. Carolina Power & Light Co.*, 217 N. C. 1, 6 S. E. (2d) 822, at 828].

Mojave Desert" [*Id.*, p. 15],— the former almost 200 miles below, and both in foreign watersheds. So to employ Tinnemaha Reservoir for storage would be to *destroy* its normal *function* at the very time when such regulation is demanded, *i. e.*, during peak flows of the river. This the State Court ignores. Moreover, it further ignores the uncontradicted showing by petitioners that they have *no flowage rights* either in the Santa Clara River or on the Mojave Desert; and thus (in addition to ruling that, at their peril, petitioners must use that regulating reservoir for a purpose foreign thereto and the excess capacity of their other facilities for the transportation, storage and spreading of surplus water not needed),—that Court imposes on them the necessity of acquiring flowage rights,—all to the end that respondent's operations on Owens Lake may be rendered *more profitable.*

(10) The State Court, without considering the essential function of the *outlet gates* in petitioners' diversion dam at Intake, declares that those gates "did not dispel the impression of *permanence* [of diversions by petitioners], for it was evident from the continued dryness of the lake that they *were* kept closed." [143 Pac. (2d) 16.] Indeed, those gates were kept closed during 9 out of the 18 years' drought for the obvious reason that petitioners were then diverting *all* of the river flow and there was *no* surplus to pass through the outlet gates if they had been opened. In the other 9 years of the drought, the gates were *opened* for an aggregate period a few hours short of 99 days. It is the obvious *function* of such gates,—and

not their actual *operation*,—that "destroys all idea of *permanence*"[12] in respect of petitioners' diversions. No appropriator installs such costly and permanent structures and the mechanical apparatus to open or close the same at will, or (having installed them), operates the same, *except* for the purpose of discharging water therethrough,—most usually surplus water in excess of the needs of the appropriator.

(11) The State Court is correct in declaring that petitioners opened the outlet gates in their diversion dam intermittently from February to June, inclusive, 1937. In so declaring, however, that Court overlooks the facts not only that the gates were so operated to permit surplus water in excess of petitioners' needs continuing its natural flow down the natural channel of Owens River to its natural point of discharge in Owens Lake, but also that the earlier of these openings were due to ice jams in the Aqueduct canal between Intake and Haiwee Reservoir that prevented the operation thereof.

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[12]*Mitchell Drainage District v. Farmers' Irrigation District*, 127 Neb. 484; 256 N. W. 15, at 22.

The Fundamental Errors of the Supreme Court of California.

The fundamental errors of the State Court in respect of the *jurisdictional* points here presented derive from its treatment of the dry condition of Owens Lake that developed during the dry cycle of years as having been caused *solely* by petitioners' diversions. Although in 1937 those diversions continued in greater volume than ever before, they *could not* have the effect of preserving the lake's dryness because of the still greater increase in the river flow over the direfully low stage to which it had declined during the drought. The lake discharge is the *residual* water left in the river after petitioners' diversions therefrom, and, assuming petitioners' diversions to be constant, this residual must necessarily fluctuate with the river flow.

In short, having given *no* consideration to the *absolute volume* of petitioners' diversions in 1937 and in the months from February to June, inclusive, of that year, in comparison with the absolute volume of their diversions in prior corresponding periods, but looking only to the *effect* of those diversions upon the lake bed during the years of *drought*,—*i. e.*, the dry condition of Owens Lake,—and the termination of that condition with the recurrence in 1937 of a *wet year* and the concomitant heavy river flow, the State Court could not but have fallen into further error in invoking and applying the rules upon which its decision proceeds,—namely, "that one who makes substantial expenditures in reliance on long-continued diversion of water by another has a right to have the diversion *continued* if

his investment would otherwise be destroyed," and that "a change in the flow of a stream that appears to be *permanent* usually leads to costly adjustments by those interested, as they come to regard the *artificial* condition as *permanent* [and] it is therefore reasonable that they should receive as much protection as if the condition were *natural.*' [143 Pac. (2d) 15-16.]

The rules just referred to contemplate a *dis*continuance by the diverter of previous long-continued diversions by him constituting the type of alteration in the natural stream flow that is effected by means of an *artificial* channel serving,—*not* a specific and limited purpose, as does the Los Angeles Aqueduct,—but *all* the purposes of the *natural* channel in substitution therefor, either total or *pro tanto.* In such a case, neither discontinuance of the flow in the substituted channel, nor restoration of the flow to the original channel, is permissible to the injury of those who have adjusted themselves or made investments in reliance on the permanence of such substitution. But the Los Angeles Aqueduct serves *only* a specific and limited purpose (the *municipal needs* for water) which is determinative of the volume of the diversions thereinto from time to time, in step with the *fulfillment* of that purpose, and correspondingly determinative of the *extent* of the *use* of the Aqueduct's *capacity*, whereon alone could respondent place any reliance whatsoever. Hence, there is *no* factual feature of these causes that can serve to render such rules operative.

Moreover, even if these causes presented a case of channel substitution (which, emphatically, they do *not*), such substitution, instead of being total, could be at most a *pro tanto* substitution measured—not by the Aqueduct's *capacity*,—but by petitioners' *past use* of that capacity; and as there was neither cessation nor curtailment by petitioners of their diversions in 1937 or in the months of that year here in question as compared with their diversions in any prior corresponding period, there was *no break* in their permanence in point either of time or of volume. The artificial condition produced by petitioners was the continuous abstraction, year by year, of certain absolute volumes of water from the river and the corresponding reduction in the residual flow left in the river to pursue its natural course into Owens Lake. This artificial condition not only *continued* throughout 1937, but, as petitioners' diversions in that year and in the crucial months thereof were larger than in any prior corresponding period, such artificial condition was then *accentuated* instead of ceasing or being diminished. The whole difficulty of the State Court is in confusing the dry condition of the *lake* during the drought (due to the decrease of the river flow and the consequent decrease in the residual water), with the only artificial condition produced by *petitioners*, namely, the *abstraction* from year to year of definite volumes of whatever flow *nature* presented in the river at Intake,—such abstraction in 1937 and in the crucial months thereof being greater than in any prior corresponding period.

Petitioners' Supposed Opportunities for Disposing of Surplus Water.

No large scale *disposal* of surplus water can be made without large capital and operating *outlays* by petitioners and also the *employment* of their existing facilities either to an extent not needed by them, or, in the case of their regulating reservoir, for a purpose (storage) in suspension of its normal *regulatory* use when flow regulation is alone necessary.

Reasons Relied on for the Issuance of the Writs.

So long as water runs and the decision and judgment of the State court herein stands, petitioners will be subjected to penalization in damages, in sums vastly greater than those awarded in the causes at bar, whenever *precipitation* in the watershed of Owens River and Owens Lake produces stream flows in excess of the diversions necessary to supply the current *demands* (including carryover storage) served by petitioners. Already, up to 1942, claims in that behalf have been made against petitioners in the aggregate sum of $2,560,258.17 (in addition to that upon which the judgment herein was entered), and suits on such claims are pending to recover damages in the total amount of $1,543,603.96.

It requires no argument to demonstrate that the decision of the State court, in imposing such outlays and such additional, unneeded and functionally destructive uses of its facilities, for respondent's benefit by rendering the lake brines still more profitable than petitioners' diversions have already made them, constitutes a taking of petitioners' property *without due process of law* within the meaning of the 14th Amendment.

By its decision and judgment herein (unless the same be reversed by this court), the Supreme Court of California will have established the following as principles of law:

(1) That an appropriator of the water of a stream is obligated to divert therefrom water for which he has *no* beneficial use, whenever he has unused conduit *capacity* sufficient to enable him so to do, and to dispose of this unusable water at his own expense, if such action will *profit* a downstream proprietor.

(2) That an appropriator who has diverted water over a series of years in amounts uniformly determined by the *demands* served by him, using only *part* of the capacity of his conduit built in anticipation of the growth of those demands, is *obligated*,—not merely to *continue* diversions measured either by his current demands or by his maximum prior diversions,[13]—but to *increase* his diversions, for the profit of such downstream proprietor, by such amount in excess of said demands and of his prior diversions as, within his *surplus* conduit *capacity*, may be naturally flowing in the stream;

(3) That the inhibition upon the "waste of water" contained in Article XIV, Section 3, of the Constitution of California, forbids an appropriator to *permit* the *natural discharge* of water into a saline lake constituting the

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[13]Petitioners do *not*, of course, conceded that an appropriator, merely as such, is under *any* obligation to a downstream proprietor to divert water at all or in any amount, such appropriator's right being that of a mere *licensee*,—to be availed of or not at his will. If the rule were otherwise, however, the extent of his obligation (under that hypothesis) would be measured by his *prior diversions*,—*not* by the *capacity* of his diversion facilities.

stream's natural outlet, whenever such discharge would render its mineral deposits *less profitably available* to a proprietor on such lake.[14]

(4) That an appropriator of water, by diverting annually over a series of years (1919-1936), a net minimum (1924) of 144,000 acre feet,—126,000 from Owens River and 18,000 from lateral streams below,—and a net maximum (1927) of 265,000 acre feet,—250,000 from Owens River and 15,000 from said lateral stream [Plff. Exhibit 1, pp. 63, 43],— becomes obligated to a downstream proprietor to divert thereafter (1937) 368,000 acre feet [Deft. Exhibit Z 8], *i. e.*, 97,000 in excess of that year's *actual* diversions, the then highest on record (271,000 acre feet, 260,000 from Owens River and 11,000 from said lateral streams),—he having no beneficial use for such excess water,—because his facilities are of a capacity to enable him so to do, and that he becomes further obligated to provide additional means of disposing of such excess [Plff. Exhibit 1, pp. 64, 44], if such downstream proprietor's *access to natural resources* is thereby rendered more profitable. That is to say,—said downstream proprietor thereby acquires, as against such appropriator, a right,—*not* measured by, nor commensurate with, the *conduct* of the appropriator creating that

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[14]The California constitutional inhibition upon the "waste" of water has heretofore been held to have no reference to natural discharges from streams into saline lakes or into the Pacific Ocean. See,

Meridian, Ltd. v. San Francisco, 13 Cal. (2d) 424, at 444-46;

City of Los Angeles v. Aitken, 10 Cal. App. (2d) 460, at 474; and

City of Elsinore v. Temescal Water Co., 36 Cal. App. (2d) 116, at 130.

right,—but *transcending* the same by at least the difference between his current needs (or his maximum prior diversions) and the natural stream flow that can be accommodated within the capacity of his conduit.

(5) That said appropriator, in order to *dispose* of such surplus water must, at his peril, *acquire* the necessary reservoirs and/or flowage rights in land and/or in any available stream, at his own expense, and utilize the same and the excess capacity of his conduit to effect unneeded storage, both surface and underground, *exceeding* any prior storage practiced by him, and also must *waste* water both by the means indicated and by indirect discharge into the sea,—all for the profit of such downstream proprietor.

As will be developed in the brief accompanying this petition, every one of the foregoing propositions, enunciated and implicit in the decision and judgment whereof a review is sought, would, in respect of their several subject matters, change the law of California as established, *without prior dissent*, by the decisions of the Supreme Court of that State.

Conclusion.

Your petitioners present herewith a transcript of the record of said causes, duly certified, and, as part of this petition, a brief more fully presenting their views upon the questions involved and their reasons for believing those questions to be of sufficient importance to justify the granting of said petition.

For the reasons and upon the grounds herein and in said brief set forth, your petitioners pray that there be

issued out of this Honorable Court its said writs of certiorari directed to the Supreme Court of the State of California; that the said decision and judgment of the said Supreme Court of the State of California may thereafter be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

THE CITY OF LOS ANGELES, a municipal corporation,

and

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, a department created under the Charter of said City,

Petitioners.

By RAY L. CHESEBRO, *City Attorney;*

S. B. ROBINSON, *Chief Assistant City Attorney for Water and Power;*

SAMUEL POORMAN, JR., *Assistant City Attorney;*

A. E. CHANDLER, *Special Counsel;*

By SAMUEL POORMAN, JR.,

Counsel for Petitioners.

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